Supreme Court of the United States

OCTOBER TERM, 1951

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NO. 619

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WILLIAM PROPST, WILBUR E. COOLEY AND CARL OLSON,

Appellants,

VS.

THE BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA, ET AL.

—o—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

—o—

PETITION FOR REHEARING

—o—

Comes now William Propst on behalf of himself and all holders of School Land Leases, similarly situated, plaintiff, and Wilbur E. Cooley and Carl Olson, intervenors, the petitioners in the above entitled cause No. 619, in which an order was entered by this Court on March 24,

1952, dismissing this appeal for "want of a substantial federal question," and file this, their petition for rehearing and for grounds thereof, respectfully represent:

Petitioners feel that the issue involving a "substantial federal question" was not adequately stressed in their jurisdictional statement, and that this Court failed to adequately consider this issue in that no cases were cited under the due process statement contained on pages 24 and 25 of the statement as to jurisdiction A.

May we respectfully state our position in this Petition for Rehearing as follows:

We say that the action of the Board of Educational Lands and Funds in cancelling our existing leases was depriving us of property rights without due process of law. The State Board went further and immediately began offering the land covered by our leases at public auction without any hearing or without any type of court action.

The lessees involved in this litigation were not parties in the Ebke case, or any other case in the state court. Neither the Ebke case nor any other case dealt with a situation where a lease *had been executed.* The Ebke case, and all other cases in the state court, dealt only with *who* should get the lease. Our case deals with the question of what should be done in cases where the leases *had already been executed,* and where the state had ratified the leases, collected the rents, and even collected ½ of the consideration in cases where such leases were assigned.

We say that under such circumstances, we have been deprived of claimed rights under the executed and ratified

leases without due process. The learned three judge court apparently held that we could still litigate this issue in the state courts. But the case of *Home Telephone and Telegraph Co. v. Los Angeles* held specifically that it was not necessary to exhaust the remedies in state courts before invoking the protection of the federal courts where there was a violation of rights protected by the Fourteenth Amendment.

We say simply that this court should entertain jurisdiction to determine the question of whether we do or do not have property rights under the leases which were executed, delivered and ratified. We ask this court to pass upon this issue rather than leave the determination to a state board which decided the issue.

We submit that the action of a state board has frequently been held to violate the provisions of the Fourteenth Amendment to the United States Constitution. See *Appleby v. Delaney*, 271 U. S. 403, in which Mr. Chief Justice Taft delivered the opinion and reviewed many previous decisions of the United States Supreme Court. See also *King Manufacturing Co. v. Augusta*, 277 U. S. 101, *Sultan Ry. and Timber Co. v. Department of Labor*, 277 U. S. 135.

Here was the state board, which had both constitutional and legislative authority to deal with the subject matter of school land leases. The Board was composed of the Governor, the Attorney General and other state officers. Obviously it was acting for and in behalf of the state. Its action in sweeping away our rights under existing and ratified leases was the action of the State of

Nebraska in taking away our property rights without due process of law.

At the first hearing before the District Court which involved the question of an interlocutory injunction, we briefed this question and argued the same before the Court. After the District Court took jurisdiction to hear the case upon its merits, we assumed that this question would not again be raised against us. This was evidently an erroneous assumption, and we should have cited those authorities which establish the fact that this case does present a "substantial federal question."

We ask this Court's indulgence in considering this question in the light of the following brief statement of what we conceive to be the controlling law in this matter.

This case involves actions taken by the Board of Educational Lands and Funds of the State of Nebraska which we alleged are confiscatory and violate the Fourteenth Amendment. This Board is a state administrative agency of the State of Nebraska, constituted under and by virtue of the Constitution of the State and composed, by constitutional direction, of the Governor, Attorney General, and other constitutional officers of the state. This action of the Board has to this time resulted in the cancelling of some 1,500 leases issued to farmers and ranchers of Nebraska, as we alleged, contrary to the provisions of the Fourteenth Amendment, and that leases upon the same lands have been and are being issued to other persons for which the State of Nebraska has already collected approximately four million dollars in bonus bids.

We urgently contend that this situation presents a "substantial federal question" and invite the Court's attention in support of this to the following:

The question of federal jurisdiction in cases involving action of state officials or state administrative Board contrary to the Fourteenth Amendment has been the subject of much controversy in the courts for many years. An authoritative discussion of this problem appears in 40 Harvard Law Review, page 969. This article was prepared by Samuel Shepp Isseks and, as revealed by the footnote, "had its origin in a report prepared for the course on Federal Jurisdiction conducted by Professor Felix Frankfurter at the Harvard Law School. The writer is greatly indebted to Professor Frankfurter for suggestions in connection with the problem herein discussed."

This paper was cited by Justice Frankfurter in the case of *Snowden vs. Hughes*, 321 U. S. 1, and is such a compelling and authoritative article on this question, that we feel that this court is not justified in finally disposing of this issue without carefully considering this paper.

Mr. Isseks assumes a case almost identical with the case brought to this court by this appeal. "A suit is brought in a federal district court to enjoin administrative action by a state official. There being no diversity of citizenship, federal jurisdiction is based solely on the claim that the acts sought to be enjoined are violative of the Federal Constitution." Mr. Isseks also assumes that the acts in question also violate a state cosntitution or statute. This element is not present in the instant case. At least the District Court held that the action of the Board was directed by the Supreme Court of Nebraska

and that the effect of Nebraska Supreme Court decisions was to leave the Board with the indicated obligation of putting the lands up for re-leasing at public auction.

Our case therefore is even more favorable than the case assumed by Mr. Isseks.

In his assumed statement of facts Mr. Isseks applies the case of *Barney v. City of New York,* 193 U. S. 430, in which situation the court held no federal jurisdiction existed. But, says Mr. Isseks, "the Barney case suffered a series of severe blows and the decision in *Home Tel. & Tel. Co. v. Los Angeles,* 227 U. S. 278, seemed to have administered the final quietus."

However, notwithstanding the Home Telephone case, Mr. Isseks suggests that the Barney case "has shown strong vitality, and has been applied by several federal courts within the past few years." (However, none of these recent cases are in the United States Supreme Court.)

The Barney case reaches its conclusion that no federal question is involved, because the action of the Board was not only *not* authorized, but was *forbidden* by the legislation, and hence was not action by the state within the intent and meaning of the Fourteenth Amendment. "Complainant's grievance was that the law of the state had been broken and not a grievance inflicted by action of the legislative or executive or judicial departments of the state; and the principle is that it is for the state courts to remedy acts of state officers done without authority of or contrary to state law."

Mr. Isseks, therefore, rightly reasons that, "while on its specific facts, the most that the Barney case can be said to hold is that the federal courts, in the absence of diversity of citizenship, have no jurisdiction to enjoin state administrative action claimed to be violative of the Fourteenth Amendment when the alleged state action is expressly prohibited by state law."

The obvious difference between the Barney case and the instant case is that the district court has held that the action of the Board is not prohibited by state law, but that its actions were in conformity to state law as expounded by the Nebraska Supreme Court in the Ebke and other cases. So that our grievance is one inflicted by the legislative, executive and judicial departments of the state.

In the case of *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, while the court formally adhered to the Barney case, it refused to apply the doctrine to a new situation and Mr. Justice Holmes rests his dissent on the theory that the action of the Board is not state action within the Fourteenth Amendment, he assumes that if such action is *sustained* by the Supreme Court of the state, relief may be granted by the Supreme Court of the United States on writ of error. The state would then have acted. In the instant case the district court has held that the Supreme Court of the state has sustained and actually directed the Board's action.

Mr. Isseks concludes that the Barney doctrine as a constitutional limitation barring the federal courts from enjoining state action in controversies where the state law prohibits the act alleged to violate the federal constitu-

tion, must be discarded. The Home Telephone case, decided by the Supreme Court, definitely settles that.

Mr. Isseks evidently is still convinced that the results obtained in the Barney case are, in some cases, desirable, and that such results, regardless of the Home Telephone case, can be obtained in meritorious situations by the court's discretionary powers to withhold jurisdiction, but he limits this to situations where, by the plaintiff's own showing, the act sought to be enjoined is unauthorized by state law.

It is therefore apparent that the most favorable case decided by the United States Supreme Court that could be cited against jurisdiction in the instant case is the Barney case, and the only facts therein that can even justify the result obtained are lacking in the instant case. In this case the district court has held that the action of the Board is the direct result of the Nebraska Supreme Court mandate and are therefore *authorized* by the law of Nebraska.

Under the authority of the Home Telephone case this court must assume jurisdiction, even though the action of the Board was *unauthorized* by state law, except that it might invoke its inherent discretionary power to accomplish an obvious desired result. But where, as in the instant case, the action of the Board has been authorized by the Supreme Court of the State of Nebraska, there is no precedent to deny jurisdiction from any source.

In the case of *Snowden v. Hughes,* 321 U. S. 1, Mr. Chief Justice Stone delivered the opinion, and said therein:

> "The authority of *Barney v. City of New York*, on which the Court below relied, has been so restricted by our later decisions, see *Raymond v. Chicago Traction Co.*, 207 U. S. 20; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278; *Iowa-Des Moines Bank v. Bennet, supra*; *United States v. Classic*, 313 U. S. 299, that our determination may be more properly and more certainly rested on petitioner's failure to assert a right of a nature such as the Fourteenth Amendment protects against state action."

It is evident, therefore, that Justice Stone is not willing to depart from the Home Telephone case and reinstate the Barney case. However, Justice Frankfurter in his concurring opinion seems to follow the Barney case, and states that "neither the wisdom of its reasoning, nor its holding, has been impaired by subsequent decisions."

It would appear, therefore, that this Court has not limited the Home Telephone case so as to deny jurisdiction in these cases, even though the action of the Board is unauthorized by state law. However, in the instant case, this is not material because the action of the Board of Educational Lands and Funds is the action of the state. It is a constitutional administrative Board, composed of the constitutional officers of the state, and by direction of the constitution is empowered to lease said school land under the direction of the legislature. The action of this Board is not in defiance of any state statute, but under claimed authority of a mandate from the Supreme Court of Nebraska.

It would seem to us, therefore, that this Court cannot escape jurisdiction, even by application of the Barney theory which this Court has evidently refused to apply since the Home Telephone case.

In addition to the cases cited in this petition, we respectfully call the Court's attention to the following cases: *Ex Facto Young*, 209 U. S. 123, 150, 155; *Greene Auditor v. Louisville Co.*, 244 U. S. 499; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 363, 300; *Sterling v. Constantine*, 287 U. S. 378; *Illinois Ex rel McCollum*, 333 U. S. 203; *Shelley v. Kraemer*, 334 U. S. 1.

Wherefore, upon the foregoing grounds, and for other reasons appearing in Petitioners' briefs, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this Petition.

It is hereby certified that the above petition is presented in good faith and not for the purpose of delaying the mandate or any further proceedings herein.

Respectfully submitted,

JAMES J. FITZGERALD,

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BRUCE K. LYON,

HENRY W. CURTIS,

Counsel for Appellants.